

1 THE HONORABLE ROBERT S. LASNIK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 GREENHOUSE CONDOMINIUM
11 HOMEOWNERS ASSOCIATION, a
12 Washington non-profit corporation,

13 Plaintiff,
14 v.
15

CHUBB CUSTOM INSURANCE
COMPANY, a division of Federal Insurance
Company, a New Jersey corporation,
LEXINGTON INSURANCE COMPANY, a
Delaware corporation, and ALLSTATE
INSURANCE COMPANY, an Illinois
corporation,

16 Defendants.
17
18

NO. CV 03-2941 L

PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: JOINT
AND SEVERAL LIABILITY OF
DEFENDANT CHUBB CUSTOM
INSURANCE COMPANY POLICY
NUMBER 7947-58-48 DAW

**NOTE ON MOTION CALENDAR:
[FRIDAY, MARCH 26, 2004]**

19 I. INTRODUCTION

20 This case involves a condominium owners association's claims for insurance
21 coverage to repair progressive property damage. In Washington, the language of the
22 insurance contract determines the scope of coverage. Like all other contracts, courts must
23 enforce the insurance contract as written and may not rewrite it to reflect what the

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1 insurance company, in hindsight, wished it had drafted. In this case, one of the property
 2 insurance policies at issue contains no temporal limitation on the scope of coverage. As
 3 such, plaintiff requests an order simply enforcing that policy to provide coverage as written.

4 II. RELIEF REQUESTED

5 This motion only involves one of the insurance policies issued by defendant Chubb
 6 Custom Insurance Company ("Chubb"). This motion does not seek relief as to claims
 7 against, or insurance policies issued by, defendants Allstate Insurance Company or
 8 Lexington Insurance Company.

9 Plaintiff Greenhouse Condominium Owners Association ("Greenhouse") requests
 10 that this Court rule as a matter of law that: (a) defendant Chubb is jointly and severally
 11 liable to Greenhouse for Greenhouse's entire, progressive property damage loss covered
 12 by Chubb's 1999 – 2000 property policy; (b) Chubb's liability under the terms of its 1999 –
 13 2000 property policy is not limited to damage occurring during that particular policy period;
 14 and (c) it is Chubb's burden to apportion liability to other insurers, not Greenhouse's
 15 burden.

16 This motion does not seek to limit Chubb's right of contribution against
 17 Greenhouse's other property insurers once it indemnifies Greenhouse for loss covered
 18 under the Chubb policy.

19 III. STATEMENT OF FACTS

20 A. THE GREENHOUSE CONDOMINIUM AND ITS PROPERTY INSURERS.

21 The Greenhouse Condominium is a 68-unit condominium complex located in North
 22 Seattle. Chubb issued a commercial insurance package to Greenhouse, for the policy
 23 period spanning October 1, 1999 through October 1, 2000, which provided property

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1 insurance and general liability insurance. It is the commercial property insurance coverage
 2 contained in the 1999 – 2000 Chubb package policy that is the subject of this motion.¹ The
 3 relevant Chubb commercial property policy is numbered 7947-58-48 DAW, but for
 4 purposes of this motion shall be referred to as “Chubb 99-00.” Defendant Allstate
 5 Insurance Company insured Greenhouse under commercial property policies, with policy
 6 periods spanning 1995 – 1999. Defendant Lexington Insurance Company insured
 7 Greenhouse under a commercial property policy having a policy period from October 1,
 8 2001 through October 1, 2002.

9 Greenhouse Condominium suffered from extensive rot, decay and structural framing
 10 damage. Although the damage was progressive over a period of years, Greenhouse and
 11 Chubb agree that damage occurred while Chubb 99-00 was in effect.

12 **B. GREENHOUSE MAKES A PROPERTY DAMAGE CLAIM TO CHUBB.**

13 On December 18, 2002, Greenhouse submitted a claim to Chubb under Chubb 99-
 14 00, seeking insurance coverage for the damage to the condominium. By letter dated
 15 November 24, 2003, Chubb accepted coverage for a minor portion of Greenhouse’s claim
 16 under Chubb 99-00, and denied coverage for the balance of the claim. In its November 24
 17 letter, Chubb determined it owed 5 percent of the costs to repair the damage under the
 18 following analysis:

19 Based on Chubb’s investigation, we have determined that there is coverage
 20 for a portion of the insured’s loss under policy no. 7947-58-48 DAW, which
 21 was in effect from October 1, 1999 to October 1, 2000.

22 ¹ Chubb also insured Greenhouse for the policy period spanning October 1, 2000 through October 1, 2001.
 23 However, only the ’99-’00 policy is relevant for purposes of this motion.

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1 We [Chubb] understand that the Washington courts have endorsed an injury-
 2 in-fact trigger for first-party progressive property loss claims such as this one.
 3 Therefore, and assuming no applicable exclusions or defenses, Chubb is
 4 responsible only for the damage that actually occurred during the October 1,
 5 1999 to October 1, 2000 policy period.

6 (Exhibit A to the Declaration of Gregory L. Harper.)

7 Chubb's determination that it only owed 5 percent of the total covered damage was based
 8 upon work performed by Exponent Failure Analysis Associates ("Exponent"), an
 9 engineering firm retained by Chubb. In this regard, a November 12, 2003 report authored
 10 by Exponent concluded:

11 [Exponent] was asked to estimate the percentage of overall
 12 water damage that occurred during the reported policy period of
 13 October 1, 1999, to September 30, 2000.

14 ...

15 In summary, we estimate that at most 5 percent of the overall
 16 deterioration from 1979 to 2002 occurred during the policy
 17 period of interest.

18 (Exh. B to Harper Decl.)

19 C. THE TERMS OF CHUBB 99-00's COMMERCIAL PROPERTY COVERAGE.

20 Chubb 99-00 promised to indemnify Greenhouse for covered losses. Specifically,
 21 the coverage grant contained in the commercial property coverage of Chubb 99-00 states:

22 We will pay for loss you incur for each Subject of Insurance only
 23 when a Limit of Insurance is stated in the Declarations. The
 24 loss must occur at the premises stated in the Declarations,
 25 unless otherwise stated, and result from direct physical loss or
 26 damage by a Covered Cause of Loss.

27 The most we will pay for loss or damage in any one occurrence
 28 is the amount of loss, not to exceed the Limits of Insurance
 29 stated in the Declarations.

30 (Commercial Property Insurance, Form 40-02-1100A (Rev. 5-86)); (Exh. C to Harper Decl.)

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1 This coverage grant is repeated in another form comprising the commercial property
2 coverage of Chubb 99-00:

3 We will pay for direct physical loss or damage to each Subject
of Insurance except as stated in Limitations or Exclusions.

4 (Commercial Property/Business Income Covered Causes of Loss, Form 40-02-1400-B

5 (Rev. 7-87)); (Exh. D to Harper Decl.)

6 **D. THE TERMS OF THE LIABILITY COVERAGE CONTAINED IN CHUBB'S 1999 -
2000 PACKAGE POLICY.**

7 Unlike the language of the commercial property coverage contained in Chubb 99-00,
8 the language of the liability insurance coverage forming part of Chubb 99-00 expressly
9 limits the scope of coverage to damage occurring during the policy period:

10 We will pay damages the insured becomes legally obligated to pay by reason
11 of liability imposed by law or assumed under an insured contract because of:

12 bodily injury or property damage caused by an occurrence; or
13 personal injury or advertising injury

14 to which this insurance applies.

15 This insurance applies:

- 16 1. to bodily injury or property damage *which occurs during
the policy period*; and
- 17 2. to personal injury or advertising injury *only if caused by
an offense committed during the policy period*.

18 (Commercial General Liability Insurance, Form 40-02-2000-B (Rev. 7-87) (emphasis
19 added)); (Exh. E to Harper Decl.)

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1 **E. THE TERMS OF THE ALLSTATE AND LEXINGTON COMMERCIAL PROPERTY
2 POLICIES.**

3 Allstate and Lexington insured Greenhouse in policy periods prior to and after
4 Chubb, respectively. In contrast to the terms of Chubb 99-00, the terms of the Allstate and
5 Lexington insurance contracts limit coverage to damage commencing during the respective
6 policy periods.

7 Specifically, the Allstate Commercial Property insurance policy insuring Greenhouse
8 contained the following coverage grant:

9 We will pay for direct physical loss of or damage to covered property at the
10 premises described in the Declarations of this Coverage Part caused by or
11 resulting from any Covered Cause of Loss.

12 (Building and Personal Property Coverage Form (Special), BU9402A (Ed. 8-89)); (Exh. F to
13 Harper Decl.)

14 Under this Coverage Part:

15 1. We cover loss or damage *commencing*:

16 a. ***During the policy period shown in the Declarations***

17 (Commercial Property Conditions, Form BU9508 (Ed. 8-89)) (emphasis added)); (Exh. F to
18 Harper Decl.)

19 Similarly, the Lexington Commercial Property insurance policy insuring Greenhouse
20 contained the following coverage grant:

21 We will pay for direct physical loss of or damage to Covered Property at the
22 premises described in the Declarations caused by or resulting from any
23 Covered Cause of Loss.

24 (Building and Personal Property Coverage Form, CP0010(Ed.07/88)); (Exh. G to Harper
25 Decl.)

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1 Under this Coverage Part:

2 1. We cover loss or damage *commencing*:

3 a. ***During the policy period shown in the Declarations . . .***

4 (Commercial Property Conditions, CP0090(Ed.07/88)) (emphasis added)); (Exh. G to
5 Harper Decl.)

6 **F. GREENHOUSE AND CHUBB AGREE THAT DAMAGE OCCURRED DURING
THE PERIOD CHUBB 99-00 WAS IN EFFECT.**

7 As admitted by Chubb in its November 24, 2003 letter, and as established by the
8 accompanying declaration of Gary Swenson, P.E., Greenhouse and Chubb agree that
9 covered property damage occurred during the period Chubb 99-00 was in effect, i.e.
10 between October 1, 1999 and October 1, 2000. Under established Washington law, and
11 under the express terms of Chubb 99-00, the occurrence of progressive damage during the
12 period Chubb 99-00 was in effect triggers coverage for Greenhouse's entire, covered loss.
13 Accordingly, Chubb 99-00 is jointly and severally liable for plaintiff's entire, covered loss
14 and Chubb is precluded from asserting the defenses that: (1) its liability for the progressive
15 damage at the Greenhouse Condominium is limited to the amount of damage occurring
16 between October 1, 1999 and October 1, 2000; and (2) damage must be apportioned as
17 between Chubb 99-00 and Greenhouse's other property insurers.

18 **IV. STATEMENT OF ISSUE**

19 Whether the terms of Chubb 99-00 require Chubb to be jointly and severally liable
20 for Greenhouse's entire progressive property damage loss covered by that policy.

21 **V. EVIDENCE RELIED UPON**

22 The Declaration of Gregory L. Harper, with attached Exhibits A through H; and

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1 The Declaration of Gary M. Swenson, P.E.

2 **VI. ARGUMENT**

3 **A. SUMMARY JUDGMENT STANDARDS AND THE STANDARDS APPLICABLE TO
INTERPRETING CONTRACTS OF INSURANCE.**

4 Summary judgment is appropriate when the moving party demonstrates “that there
5 is no genuine issue as to any material fact and that the moving party is entitled to judgment
6 as a matter of law.” FED. R. Civ. P. 56(c); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134
7 (9th Cir. 2000).

8 The interpretation of an insurance policy is a question of law. McDonald v. State
9 Farm Fire & Cas. Co., 119 Wn.2d 724, 730, 837 P.2d 1000 (1992). In determining whether
10 coverage exists, the insured has the burden of proving that the losses fall within the scope
11 of the policy’s coverage grant. Id. To avoid coverage, the insurer has the burden of
12 proving that the loss is excluded by specific policy language. Id. at 731.

13 In first-party cases, Washington courts emphasize “close scrutiny and interpretation
14 of policy contract language.” Ellis Court Apts. Ltd. Partnership v. State Farm Fire and
15 Casualty Company, 117 Wn. App. 807, 814, 72 P.3d 1086 (2003). In this regard,
16 Washington courts utilize the following criteria when interpreting insurance contracts:

17 In Washington, insurance policies are construed as contracts. An insurance
18 policy is construed as a whole, with the policy being given a “fair, reasonable
19 and sensible construction as would be given to the contract by the average
20 person purchasing insurance.” If the language is clear and unambiguous, the
21 court must enforce it as written and may not modify it or create ambiguity
22 where none exists. If the clause is ambiguous, however, extrinsic evidence of
23 intent of the parties may be relied upon to resolve the ambiguity. Any
 ambiguities remaining after examining applicable extrinsic evidence are
 resolved against the drafter-insurer and in favor of the insured. A clause is
 ambiguous when, on its face, it is fairly susceptible to two different
 interpretations, both of which are reasonable.

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1 Id. (citing Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66, 15
 2 P.3d 115 (2000)).

3 Washington courts read insurance policies as the lay purchaser of insurance would
 4 understand them. Zinn v. Equitable Life Ins. Co. of Iowa, 6 Wn.2d 379, 384, 107 P.2d 921
 5 (1940). The intent of Washington insurance law “is to encourage insurance companies to
 6 plainly write their coverage so laypersons can understand it.” Commonwealth Ins. Co. of
 7 America v. Grays Harbor County, (No. 28922-9-II, 2004 Wash. App. LEXIS 248 at *9)
 8 (referencing Kunin v. Benefit Tr. Life Ins. Co., 910 F.2d 534, 540 (9th Cir. 1990) (“[T]he
 9 insurer should be expected to set forth any limitations on its liability clearly enough for a
 10 common layperson to understand.”)).

11 **B. COVERAGE UNDER CHUBB 99-00 WAS TRIGGERED.**

12 It is undisputed that covered damage occurred during the period Chubb 99-00 was
 13 in effect. As disclosed in Chubb’s November 24, 2003 letter, Exponent, Chubb’s
 14 engineering expert, concluded that covered damage occurred during the period Chubb 99-
 15 00 was in effect. Gary Swenson, Greenhouse’s expert, agrees that property damage
 16 occurred during the period of time Chubb 99-00 was in effect. (See Swenson Decl. at ¶13.)

17 In Washington, actual loss, even minute loss, triggers coverage under a first-party
 18 property policy. In Villella v. Public Employees Mut. Ins. Co., 106 Wn.2d 806, 725 P.2d 957
 19 (1986), the issue was whether an 8-inch subsidence of a house foundation was covered
 20 under a policy that expired more than a year earlier. The insured homeowner argued that
 21 because the negligence causing the subsidence occurred during the policy period, there
 22 was coverage, even though the actual subsidence occurred after the policy had expired.
 23 The Washington Supreme Court rejected this argument, and required some damage – as

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opposed to causation – occur during the policy period. Id. at 811-14. Villella thus established the rule in Washington that any actual loss during the policy period, “however minute,” will trigger coverage under a property policy. Id. at 814; see also Fujii v. State Farm Fire & Casualty, 71 Wn. App. 248, 857 P.2d 1051 (1993), review denied, 123 Wn.2d 1009 (1994) (physical damage to dwelling during policy period required to trigger coverage); Pederson’s Fryer Farms v. Transamerica Ins. Co., 83 Wn. App. 432, 443-44, 922 P.2d 126 (1996), review denied, 131 Wn.2d 1010 (1997) (“Compensable damage occurring during the policy period ‘triggers’ an insurer’s obligation to pay”); Transcontinental Ins. Co. v. Washington Public Utilities Districts’ Utility System, 111 Wn.2d 452, 465, 760 P.2d 337 (1988) (the time of an occurrence for insurance coverage purposes is determined by when damages or injuries take place).

The record is undisputed that actual, covered loss took place at the Greenhouse Condominium during the period Chubb 99-00 was in effect. As such, there is no dispute that coverage under Chubb 99-00 was triggered and Greenhouse has met its initial burden of proving that its loss falls within the scope of Chubb 99-00’s coverage grant. The remaining question addressed by this motion is *the extent* of Chubb’s indemnification obligation under the terms of Chubb 99-00.

C. BY ITS TERMS, CHUBB 99-00, THE POLICY THAT INSURED GREENHOUSE DURING THE OCCURRENCE OF PROGRESSIVE DAMAGE, IS JOINTLY AND SEVERALLY LIABLE FOR GREENHOUSE’S ENTIRE COVERED LOSS.

The commercial *property* coverage part of Chubb 99-00 contains no language or condition limiting the scope of its coverage to damage that occurs only during its policy period. On the other hand, the commercial *liability* coverage form that is part of Chubb’s 1999 – 2000 package policy does contain such a limitation, e.g. “This insurance applies to

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1 bodily injury or property damage *which occurs during the policy period . . .*" Similarly, the
 2 "Conditions" sections of the Allstate and Lexington property policies covering Greenhouse
 3 state, "We cover loss or damage *commencing during the policy period shown in the*
 4 *Declarations.*"

5 Insurance policies are construed as a whole and are interpreted as contracts, with
 6 "close scrutiny" and "interpretation" being given to "policy contract language." Ellis Court,
 7 117 Wn. App. at 814. "It is elementary law, universally accepted, that the courts do not
 8 have the power, under the guise of interpretation, to rewrite contracts which the parties
 9 have deliberately made for themselves." Panorama Village Condo. Owners Ass'n v.
 10 Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001). "The [insurance] industry
 11 knows how to protect itself and it knows how to write exclusions and conditions."
 12 Panorama Village Condo. Owners Ass'n v. Allstate Ins. Co., 144 Wn.2d 130, 141, 26 P.3d
 13 910 (2001) (citing Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 887, 784 P.2d 507
 14 (1990)).

15 If Chubb's intent was to only cover damage occurring within the period Chubb 99-00
 16 was in effect it was fully capable of drafting language effectuating that intent. Chubb failed
 17 to include such language in Chubb 99-00 and it is not within the province of this Court to
 18 rewrite Chubb 99-00 to say what Chubb now wishes it had said. See Panorama Village,
 19 144 Wn.2d at 141 ("If Allstate intends "hidden" to mean "unknown," it must say so.");
 20 Commonwealth Ins. Co. of America v. Grays Harbor County, (No. 28922-9-II, 2004 Wash.
 21 App. LEXIS 248 at *13 - *14) ("Commonwealth drafted the policy language. And they wrote
 22 coverage in broad terms Commonwealth could have limited coverage It did
 23 not.")

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1 Chubb, a sophisticated insurance company, certainly knew how to limit its coverage
 2 to damage occurring during a particular policy period, as that is exactly what it did with
 3 respect to its commercial general liability coverage. Allstate and Lexington effectively
 4 limited their coverage to loss commencing **during** their respective policy periods through
 5 the language contained in their property policies covering Greenhouse. Under established
 6 Washington law, this Court cannot rewrite Chubb 99-00 to limit its coverage to damage
 7 occurring between October 1, 1999 and October 1, 2000.

8 **D. THE EFFECT OF CHUBB 99-00's LANGUAGE IS THAT CHUBB IS JOINTLY
 9 AND SEVERALLY LIABLE FOR GREENHOUSE'S ENTIRE, PROGRESSIVE
 PROPERTY DAMAGE LOSS.**

10 In cases involving progressive property damage losses, Washington law holds that
 11 insurers on the risk during the time of progressive damage are jointly and severally liable
 12 for the policyholder's entire loss. See Alcoa v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 998
 13 P.2d 856 (2000); American Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co., Inc., 134
 14 Wn.2d 413, 424, 951 P.2d 250 (1998); Villella v. Public Employees Mut. Ins. Co., 106
 15 Wn.2d 806, 811-14, 725 P.2d 957 (1986); Gruol Const. Co. v. Ins. Co. of N. America, 11
 16 Wn. App. 632, 635-38, 524 P.2d 427 (1975), *review denied*, 84 Wn.2d 1014 (1974). In
 17 Gruol, Gruol built an apartment building. In January 1964, Gruol sold the apartment
 18 building to Donovan. In 1968, Donovan sued Gruol for dry rot damage to the building
 19 caused by improper backfilling during construction.

20 Safeco insured Gruol from 1962-1965. INA insured Gruol from 1965-1966.
 21 Northwestern Mutual insured Gruol from 1966-1968. The trial court found the three carriers
 22 jointly and severally liable for the settlement Gruol entered into with the plaintiff. The
 23 insurers appealed.

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1 The relevant issue on appeal was:

2 which insurer covered the damage – the insurer at the time of the defective
 3 backfilling, at the time of the discovery of the dry rot, or all insurers providing
 4 coverage during the total time period of the undiscovered condition which
 progressively worsened.

5 Gruol v. Ins. Co. of North America, 11 Wn. App. 632, 635, 524 P.2d 427 (1974).

6 The Gruol court held that insurers are jointly and severally liable for all continuous
 7 and progressive damage “even though the initial negligent act (the defective backfilling)
 8 took place within the period of Safeco’s policy coverage.” Id. at 636. In so holding, the
 9 Gruol court recognized that “the damage, though continuing over a period of time,
 10 constituted a single injury.” Id. at 637-38. Accordingly, in Washington “**all insurers on the**
 11 **risk during the time of ongoing damage have a joint and several obligation to**
 12 **provide full coverage for all damages.**” American Nat. Fire Ins. Co. v. B&L Trucking &
 13 Constr. Co., 134 Wn.2d 413, 424, 951 P.2d 250 (1998) (emphasis added) (explaining and
 14 agreeing with the holding in Gruol); see also Villella v. Public Employees Mut. Ins. Co., 106
 15 Wn.2d 806, 725 P.2d 957 (1986) (holding that when damage is continuous in nature, all
 16 triggered policies provide full coverage). The court went on to note that the burden of
 17 apportioning liability rests with the insurers. Gruol, 11 Wn. App. at 637.

18 If Chubb wished to limit its liability through a pro rata allocation of damages once its
 19 policy was triggered, Chubb could have included that language in the policy. See
 20 Monsanto Co. v. C. E. Heath Compensation & Liab. Ins. Co., 652 A.2d 30, 35 (Del. 1994)
 21 (“The majority of courts have held that without a pro rata clause in the policies, the
 22 insurance companies cannot limit their obligations to a pro rata share or portion of [the
 23 insured’s] liabilities”); B&L Trucking, 134 Wn.2d at 430 (“Further, because insurance

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1 policies are considered contracts, the policy language, and not public policy, controls. We
 2 *will not add language to the policy that the insurer did not include.*") (emphasis added). In
 3 Chubb 99-00, there is no such limiting language. The average person purchasing
 4 insurance would construe the policy language to provide indemnity for all loss once the
 5 policy was triggered.

6 Finally, in Alcoa v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 998 P.2d 856 (2000),
 7 first-party property insurers denied coverage to the insured for environmental cleanup
 8 costs. The trial court found coverage and allocated the amounts each insurer was required
 9 to pay. In reversing the trial court's allocation decision, the Washington Supreme Court
 10 adopted the reasoning from B&L Trucking when it stated that "[i]t is the policy language that
 11 determines the scope of coverage." Id. at 567. The Court went on to hold that "[t]he policy
 12 language here does not provide for any limitations to the scope of damages." Id. (citing
 13 B&L Trucking, 134 Wn.2d 413). Accordingly, the court held that "the trial court erred in its
 14 decision to prorate coverage according to the years the various . . . policies were in force."
 15 Id. at 568.

16 Here, Chubb issued a commercial property policy to Greenhouse for the period of
 17 October 1, 1999 through October 1, 2000. Under Alcoa, the plain language of Chubb 99-
 18 00 determines the scope of coverage owed by Chubb to Greenhouse. It is undisputed that
 19 the Greenhouse Condominium suffered damage covered by Chubb 99-00. (See
 20 accompanying Swenson declaration; see also Exhs. A & B to Harper Decl.) Just like the
 21 policies at issue in B&L Trucking and in Alcoa, the property coverage form contained in
 22 Chubb 99-00 does not limit the scope of coverage for this loss through a pro rata allocation
 23 or through any other means. (See Exhs. C & D to Harper Decl.) Further, under Gruol, the

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
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1 burden of apportioning damage between separate policies is on the insurers, not on
 2 Greenhouse. Accordingly, under established Washington law, Chubb 99-00 is jointly and
 3 severally liable for the full amount of Greenhouse's covered loss without limitation by
 4 allocation to Greenhouse's other property insurers.

5 In response to this motion, it is likely that Chubb will misguidedly argue that
 6 Washington law only requires property insurers to pay for covered damage that occurs
 7 during a particular policy period under the "injury in fact" trigger of insurance coverage. To
 8 that end, Chubb may attempt to rely on Mercer Place Condominium Ass'n v. State Farm
Fire & Casualty Comp., 104 Wn. App. 597, 17 P.3d 626 (2000), for that proposition. As
 10 discussed below, Mercer Place does not establish "injury in fact" as the *de jure* trigger of
 11 coverage in Washington. More correctly, Mercer Place stands for the proposition that
 12 under the *express terms of the State Farm policy at issue in that case*, State Farm was only
 13 obligated to pay for damage that commenced during the policy period.

14 Specifically, in Mercer Place, a condominium submitted a claim for collapse damage
 15 to its property insurer, State Farm. The issue on appeal was whether coverage under the
 16 State Farm policy at issue was limited to damage that occurred during the policy period. In
 17 answering this question in the affirmative, the Mercer Place court specifically relied on the
 18 language of the "Policy Period" clause in the Conditions section of the Policy, which stated
 19 "that State Farm covers loss 'commencing during the policy period.'" Id. at 603.

20 The Mercer Place court held that *under the contract language of the State Farm*
 21 *policy at issue in that case*, State Farm was only obligated to pay for damage that
 22 commenced during the policy period. Mercer Place, 104 Wn. App. at 603-05. Unlike the
 23 State Farm policy at issue in Mercer Place, Chubb 99-00 contains no such limiting

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
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language.² Under the rules of insurance policy interpretation set forth above, Chubb is obligated to pay for Greenhouse's entire loss covered by its policy, and is precluded from placing the burden on Greenhouse to apportion or allocate liability to any other prior or subsequent property insurers of the Greenhouse Condominium. To the extent Chubb has a right of contribution against Greenhouse's other property insurers, Chubb is free to pursue those rights once it has indemnified Greenhouse for its entire covered loss. In that regard, under Gruol, Chubb has the burden of apportioning liability to other insurers.

VII. CONCLUSION

For the foregoing reasons, it is proper for this Court to grant Greenhouse's requested relief.

VIII. PROPOSED ORDER

A proposed order granting the requested relief is submitted herewith.

DATED this _____ day of _____, 2004.

STANISLAW ASHBAUGH, LLP

By Gregory L. Harper
Gregory L. Harper, WSBA# 27311
Attorneys for Plaintiff

² In Regence Blueshield v. Philip Morris, Inc., 40 F. Supp.2d 1179, 1182 (W.D. Wa. 1999), Judge Rothstein held:

While the unpublished decisions in these cases cannot be cited as precedent and they are not binding on this court, they are exactly on point and, therefore, highly persuasive. Thus, the court will look to the decisions of its fellow district judges for guidance.

Such guidance is provided by Judge Zilly in the case of Parkridge Assoc. Ltd. v. West American Ins. Co., (C01-372Z W.D. Wa. 2001). In Parkridge, Judge Zilly ruled that a first-party property insurer responding to a property damage claim was jointly and severally liable for the accumulation of property damage culminating in a covered loss during the period West American's policy was in effect. In so ruling, Judge Zilly distinguished Mercer Place, because in that case State Farm's "policy had not been triggered." (Exh. H to Harper Decl.; Order Granting Parkridge's PSJ at pp.7-8).

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
JOINT AND SEVERAL LIABILITY OF DEFENDANT CHUBB CUSTOM
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STANISLAW ASHBAUGH, LLP
LAWYERS

1
2 THE HONORABLE ROBERT S. LASNIK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

12 GREENHOUSE CONDOMINIUM
13 HOMEOWNERS ASSOCIATION, a
Washington non-profit corporation,

14 Plaintiff,

15 v.

16 CHUBB CUSTOM INSURANCE COMPANY,
17 a division of Federal Insurance Company, a
New Jersey corporation, and LEXINGTON
18 INSURANCE COMPANY, a Delaware
corporation, ALLSTATE INSURANCE
COMPANY, an Illinois corporation,

19 Defendants.

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PROPOSED ORDER GRANTING
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: JOINT AND
SEVERAL LIABILITY OF DEFENDANT
CHUBB CUSTOM INSURANCE
COMPANY, POLICY NUMBER 7947-58-
48 DAW

21 THIS MATTER, having come on regularly before the undersigned judge of the above-
22 entitled court, and the Court having duly considered oral argument of counsel, if any, and the
23 following submissions of counsel:

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
JOINT AND SEVERAL LIABILITY OF DEFENDANT CHUBB CUSTOM
INSURANCE COMPANY POLICY NUMBER 7947-58-48 DAW - 17
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1. Plaintiffs' Motion For Partial Summary Judgment Re: Joint and Several Liability Of
2. Defendant Chubb Custom Insurance Company, Policy Number 7947-58-48 DAW;
3. Declaration of Gregory L. Harper with attached exhibits A-H;
4. Declaration of Gary M. Swenson, P.E.;
5. _____;
6. _____; and
7. _____.

and being otherwise duly advised as to the premises, this Court hereby

ORDERS, ADJUDGES and DECREES that Plaintiff's Motion For Partial Summary Judgment Re: Joint and Several Liability Of Defendant Chubb Custom Insurance Company, Policy Number 7947-58-48 DAW is hereby GRANTED.

Specifically, Chubb Custom Insurance Company, Policy Number 7947-58-48 DAW is, by its terms, jointly and severally liable for Plaintiff's entire covered loss. As such:

- (1) Chubb is precluded from arguing that its liability for the progressive damage occurring at Greenhouse Condominiums is limited to the amount of damage occurring between October 1, 1999 and October 1, 2000, the policy period of Policy Number 7947-58-48 DAW; and
- (2) The burden of apportioning damages to other property insurers is on Chubb, not Greenhouse.

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
JOINT AND SEVERAL LIABILITY OF DEFENDANT CHUBB CUSTOM
INSURANCE COMPANY POLICY NUMBER 7947-58-48 DAW - 18
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1 To the extent Chubb has rights of contribution against other of Greenhouse's property
2 insurers, Chubb is free to pursue those rights once it has indemnified Greenhouse for its
3 entire loss covered under Policy Number 7947-58-48 DAW.

4 DONE IN OPEN COURT this _____ day of _____, 2004.
5
6

7 JUDGE ROBERT S. LASNIK

8
9 Presented by,

10 STANISLAW ASHBAUGH, LLP

11
12 By _____
13 Gregory L. Harper, WSBA# 27311
Attorneys for Plaintiff

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE:
JOINT AND SEVERAL LIABILITY OF DEFENDANT CHUBB CUSTOM
INSURANCE COMPANY POLICY NUMBER 7947-58-48 DAW - 19
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